

**Dupont Puerto Rico, Inc. and Pablo Rosaly Vega.**  
Case 24-CA-4181

July 19, 1982

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On March 31, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The record shows that employee Rosaly's conveyor was inoperative during the entire 7 a.m. to 3:30 p.m. shift on April 17, 1979, that he reported it to management, that he was not assigned any production duties that day by either Shift Supervisor Rosada or Relief Supervisor Valentine, and that he was in and out of his department during the shift. During one of his absences, he met fellow employee Abrams who told him that Warehouse Manager Muniz had denied a raise to Abrams because of Abrams' five absences, four of which were for excused sick leave. Rosaly responded that he thought it was unfair for the Company to deny a raise on that basis, and that he would speak to Muniz because he, too, might be in a similar situation someday. Rosaly thereafter informed Valentine that he was going to speak to Muniz. He then left his work area and found and questioned Muniz about Respondent's policy on sick leave, disability, and promotions. Muniz explained Respondent's policies to Rosaly who thereupon told Muniz that he did not think that Abrams should have been denied a raise. Muniz responded that he would "discuss Abrams' raise with Abrams," whereupon Rosaly said that he would defend any technician, and returned to his work area. Muniz immediately complained to Production Manager Quinones that Rosaly was acting like "a lawyer of the employees." Quinones then told Muniz that he would have Manufacturing Manager Martinez check into why Rosaly was investigating such matters, and ordered Martinez to "investigate Rosaly's activities."

Martinez commenced his investigation by asking Rosada if he had authorized Rosaly's absences

from his work area. Rosada replied that he had not. Martinez and Rosada then posed the same question to Valentine, who also replied that he had not given such permission. Valentine also testified, however, that he had given Rosaly permission, and that he did not remember whether he had done so. The Administrative Law Judge did not resolve this conflict and found, without explanation, that Rosaly did not receive permission to leave. He also credited Rosada's testimony that he, Rosada, considered Rosaly's absences from his work area to be a "gross violation" because they were for extended periods of time. The record, however, does not disclose any specific time duration of his absences. In any event, Rosaly was given a written reprimand which placed him on a 6-month probation because of that "gross violation." On May 22 he was given another written reprimand for violating a company rule prohibiting sleeping on the job, and was terminated because Respondent considered that offense to be a serious one in light of his being on probation.

The Administrative Law Judge found "no evidence" that Rosaly was disciplined because of his protected concerted activity. He found that, although Rosaly's conversation with Muniz was protected and concerted, the written reprimands and probationary discipline were based on his unauthorized extended absences from his work area, and that such absences rendered Rosaly's protected activities unprotected and subject to discipline. Accordingly, he found it unnecessary to determine whether Rosaly's reprimand for sleeping on the job would have resulted in discharge had he not already been on probation at that time.

It is clear, as the Administrative Law Judge found, that Rosaly's inquiry of Muniz concerning Abrams and Respondent's personnel policies constituted protected concerted activity, and that such activity prompted Respondent's investigation into those activities. It is also clear that Respondent thereby violated Section 8(a)(1) of the Act. The remainder of the Administrative Law Judge's pertinent findings, however, are not so clear. In view of Valentine's conflicting testimony as to whether he had authorized Rosaly's absences and the Administrative Law Judge's unexplained reason for accepting the version that he did not, we cannot determine that permission was not given. And, even assuming that it was not, the record is devoid of any probative evidence showing that Rosaly's absences were for extended periods of time as found by the Administrative Law Judge, thereby rendering baseless that asserted reason for accusing Rosaly of committing a gross violation. We therefore conclude that Respondent's asserted grounds for plac-

ing Rosaly on probationary discipline were pretextual, and that he was so disciplined because he engaged in protected concerted activity, in violation of Section 8(a)(1) of the Act.

This being so, it follows that Rosaly's probationary status was imposed unlawfully and thus could not have been the lawful causative factor which converted his sleeping on the job into a "serious offense" which warranted discharge. The record clearly shows, and we find, a pattern of unlawful conduct calculated to interfere with Rosaly's protected Section 7 rights, and that his sleeping on the job was a fortuitous circumstance upon which Respondent seized to rid itself of a spokesman for employee grievances. Thus, to the extent that the discipline imposed upon Rosaly was a direct result of Respondent's illegally motivated investigation, any subsequent discipline imposed on him in reliance thereon also is discriminatory and violative of the Act. *Adams Delivery Service, Inc.*, 237 NLRB 1411 (1978). Accordingly, we find that Respondent further violated Section 8(a)(1) of the Act by discharging Rosaly because of his violation of Respondent's no-sleeping-on-the-job rule while on an unlawfully imposed probation.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By causing an investigation into Pablo Rosaly Vega's activities because he engaged in protected concerted conduct, by placing him on disciplinary probation on April 18, 1979, and by discharging him on May 23, 1979, Respondent interfered with, restrained, and coerced him in the exercise of rights guaranteed him by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

#### REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dupont Puerto Rico, Inc., Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging protected concerted activities of its employees by conducting investigations into

their activities, by placing them on disciplinary probation, or by discharging them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Pablo Rosaly Vega immediate and full reinstatement to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by paying him a sum of money equal to the amount he would have earned from the date of discharge, less his earnings during said period, to be computed as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>1</sup> (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Hato Rey, Puerto Rico, facility copies of the attached notice marked "Appendix."<sup>2</sup> Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>1</sup> In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

<sup>2</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage or in any way interfere with our employees' exercise of their Section 7 rights by discharging them.

WE WILL NOT cause investigations into employees' activities, place them on disciplinary probation, or discharge them for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Pablo Rosaly Vega immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore Pablo Rosaly Vega's seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

DUPONT PUERTO RICO, INC.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard in Hato Rey, Puerto Rico, on May 12-14, 1980, on a complaint alleging that Pablo Rosaly Vega, hereinafter Rosaly, was discharged because of his protected concerted activities, in violation of Section 8(a)(1) of the Act.

On the record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Dupont Puerto Rico, Inc., a Delaware corporation, has an office and place of business in Manati, Puerto Rico, where it is engaged in the manufacture, sale, and distribution of dyes. During the past year, Respondent purchased and received goods and materials at its Manati, Puerto Rico, plant, valued in excess of

\$50,000 directly from points located outside the Commonwealth of Puerto Rico. The complaint alleges, Respondent admits, and I find, on the basis of the undisputed facts noted previously, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Pablo Rosaly was hired by Respondent on July 11, 1977. On April 18, 1979, Rosaly received a "written contact," i.e., a written reprimand from Orlando Rosada, the shift supervisor, for having abandoned his work area. On May 21, 1979, he was called to Douglas Lopez' office, his immediate supervisor, and given a second written reprimand for allegedly sleeping on the job the night before. On May 22, 1979, he was escorted to the office of William Gall, the operations manager, and shown the written reprimands dated April 18 and May 22. When Rosaly denied sleeping on the job, the meeting was adjourned until the following morning to permit further inquiry into the alleged sleeping incident. On May 23, 1979, Rosaly met again with Gall. Douglas Lopez was present and stated that he had discovered Rosaly sleeping on a commode in the bathroom early in the morning of May 21 and that he identified Rosaly by the clothing he wore as he looked through the crack in the bathroom door. Rosaly was thereafter discharged. On June 26, 1979, Rosaly filed the charges herein, and a complaint subsequently issued, alleging that he was discharged because of his alleged participation in certain protected concerted activities.

B. Issues

1. Was the written reprimand given Rosaly on April 18, 1979, prompted solely by his abandonment of his work area or was it also caused in part by Rosaly's inquiries into Respondent's personnel policies?

2. Assuming, *arguendo*, that inquiries about Respondent's personnel policies is protected concerted activity, did Rosaly engage in such activities for extended periods on working time?

3. Was Rosaly's subsequent discharge on May 23, 1979, allegedly for sleeping on the job, linked to his earlier protected concerted activity, or was his alleged sleeping, standing alone, sufficient to warrant discharge?

C. Contentions of the Parties

The General Counsel contends that the written reprimand of April 18, 1979, was prompted by Rosaly's engaging in protected concerted activities, namely, *inter alia*, discussing with Alberto Muniz, the warehouse manager, why employees' use of sick leave as reflected by the John Abrams case, could result in the denial of a wage increase. In effect, the General Counsel contends that the purported reason for the reprimand, an abandonment of his work area, was not the true reason for the reprimand. Secondly, the General Counsel contends that but for the initial reprimand, which resulted in his being placed on 6 months' probation, the later conduct of

Rosaly, in allegedly sleeping on the job, would not have resulted in his discharge. Moreover, it is contended that Rosaly did not in fact sleep on the job, and his discharge was pretextual.

Respondent contends that Rosaly was discharged for cause, noting his prolonged absence from his work area, which resulted in his first written reprimand. Secondly, Respondent urges that Rosaly was in fact caught sleeping on the job, and that alone, apart from his earlier reprimand, would have warranted his discharge.

#### *D. Discussion and Disposition of the Allegations*

Apart from the legal issues, several key factual matters must be resolved in making the determination as to what really prompted the two written reprimands received by Rosaly on April 18 and May 21, 1979, which resulted in his discharge.

In determining whether Rosaly's reprimand of April 18, 1979, was prompted by his alleged protected activities, a determination must be made whether his absences from the job were excused or unexcused; and whether his absences were limited in time or extensive in nature.

Rosaly, who had been employed since July 1977, had never received a written reprimand prior to the one given him on April 18, 1979. At the time in question he was a finishing technician whose primary job duties involved filling or packing of liquid and powdered dyes into drums and the use of machines in the packing process.

On April 17, 1979, Rosaly was assigned to the 7 a.m. to 3:30 p.m. shift and reported to the liquid pack area where he was scheduled to work. He started the conveyor system and discovered it was not working properly. According to Rosaly, he reported the malfunction to Orlando Rosada,<sup>1</sup> the shift manager, because his regular supervisor, Douglas Lopez, was absent and then took a work order to the maintenance department. At that point, except for minor cleanup work, Rosaly had nothing to do except await repair of the conveyor system. Moreover, as his regular supervisor, Lopez, was off that day, he had only nominal supervision from a relief supervisor, George Valentine, who acted in such role in addition to performing his regular job duties as a control operator in the control room. The control room where Valentine worked was located some distance away from the liquid pack area where Rosaly worked. As Valentine noted, he advised the operators in the early part of the shift to use their own judgment in taking their regular scheduled breaks and luncheon break. Valentine testified that he was kept quite busy on his regular job apart from his role as relief supervisor.

For the rest of his shift, Rosaly was in and out of his work area. Whether and to what extent Rosaly was granted permission to leave his work area is factually in dispute. Rosaly's testimony is undisputed that during the rest of his shift his conveyor system never became operational and that he was not assigned other work, either

by George Valentine, his relief supervisor, or by Orlando Rosada, the shift supervisor.

According to Rosaly, sometime after leaving the work order in maintenance for repair of his conveyor line, he met John Abrams, who informed him that he, Abrams, had been denied a raise to the eighth level, a higher wage level, and had an appointment with Alberto Muniz to discuss the matter. Later Abrams informed Rosaly that he had been denied the raise because he had been absent five times during the period under consideration, even though four of the five absences were excused sick leave. Rosaly told Abrams that it was unfair to be denied a raise for use of his sick leave and told Abrams he would speak to Muniz about Abrams because he too might be in a similar situation. According to Rosaly, he informed Relief Supervisor Valentine that he was going to speak to Muniz early that morning. Rosaly did not find Muniz in his office in the administration building but about 11 a.m. he located him in the central control room, at which time he also saw Rosada, Valentine, and Rafael Martinez, the manufacturing manager, all of whom were in the control room. Rosaly opened a discussion with Muniz about Respondent's policy on sick leave, disability, and promotions as covered in Respondent's employee manual. Rosaly placed the discussion as occurring about 11 to 11:30 a.m. and the subject matter was explained to him through use of a diagram. The system used by Respondent took all absences into consideration for granting or refusing a wage increase. During the discussion, Rosaly mentioned that he did not think that Abrams' raise should have been denied and Muniz retorted that he would "discuss Abrams' raise with Abrams." Rosaly replied that he would defend any other technician and, after thanking Muniz, returned to his work area sometime around noon.

After Rosaly left, Muniz admittedly went to the office of Samuel Quinones, his immediate supervisor, and complained about Rosaly, stating "is he the lawyer of the employees?" Muniz explained Rosaly's questioning him about Abrams being denied a raise, stating he did not think it was a concern of Rosaly. Quinones responded that he would check with Rafael Martinez why Rosaly was conducting an investigation and thereafter Martinez was asked to investigate Rosaly's activities.

After departing the central control room, Rosaly returned to his work area and his conveyor line was still not functioning. He went to lunch and returned about 12:30. Maintenance employees were attempting to repair the line and as part of such repair were attempting to locate blueprints on the conveyor system. Around 2 p.m. Rosaly contacted Valentine and received permission to go on his afternoon break. Enroute to the cafeteria he encountered Francisco Rios, Respondent's training coordinator, and asked him how an employee could be penalized by being denied a wage increase for using his sick leave. This was, of course, prompted by his earlier conversations with Abrams and Muniz.

By this time, Martinez had gone to Orlando Rosada and asked him whether he had granted Rosaly permission to be out of his work area. Rosada responded he had not and they both proceeded to see George Valen-

<sup>1</sup> Rosada denied this, stating it was George Valentine, a relief supervisor for that area, who informed him of the malfunction about 10 a.m. that morning. Rosada's version is more logical and I credit it.

tine who advised them that he had not authorized Rosaly to be absent from his work area. Thereafter, at the end of the shift that day, Rosada called Rosaly into his office to discuss leaving his work area without permission. According to Rosada, whom I credit in this regard, Rosaly admitted his absences and promised to do better.

The following day, Lopez, Rosaly's regular supervisor, called Rosaly into his office and there, in the presence of Lopez, Rosada again discussed Rosaly's abandonment of his work area and asked him to sign a written reprimand, and Rosaly refused. The reprimand, General Counsel's Exhibit 2, placed Rosaly on 6 months' probation. Contrary to Rosaly's contention that he saw nothing about probation, I credit Rosada and Lopez that the reprimand contained notice of 6 months' probation.

As to the question of whether and to what extent Rosaly was authorized to leave his work area, the testimony of Valentine, the relief supervisor, deserves close scrutiny. Valentine testified that he had given permission to Rosaly, around 9 a.m. to go to the administration building. Thereafter, he saw Rosaly at the central control room about 10:30 a.m., speaking to Muniz. He stated that since he saw him there and did not say anything to him, he was in effect giving tacit permission to Rosaly to be away from his work area. In this regard, Valentine admitted giving different answers about Rosaly's being given permission to be away from his work area. To Martinez and Rosada, he denied giving Rosaly permission to talk to Muniz at the central control room which was, in fact, true. To Lopez, on the following day, he stated that he had given Rosaly permission to leave the work area. In response to a similar question by Luis Martinez, Valentine stated he did not remember whether he had given Rosaly permission to leave his work area. In sum, Valentine testified to giving three different answers to Respondent's managerial hierarchy.<sup>2</sup> I find, however, that Respondent's disciplinary action was taken on the basis of Valentine's response to the inquiries of Rosada and Martinez that he had not authorized Rosaly to leave his work area.

I conclude that Rosaly had received permission initially from Valentine to go to the administration building. When Rosaly did not find Muniz in his office, he stopped at the central control room and, discovering Muniz there, engaged him in a discussion about Respondent's policies on promotions, disability, and sick leave. It was not until Rosaly announced that he thought Abrams was unfairly denied a raise that Muniz became irked and retorted that that was a matter for him and Abrams. Later, Muniz complained to Quinones, the production manager, that Rosaly was acting like he was a lawyer for the employees, and Quinones in turn asked Rafael Martinez to check out why Rosaly was investigating such matters.

As to issue 1, therefore, I conclude that the written reprimand given Rosaly on April 18, 1979, placing him on probation, was in part triggered by his inquiries about

Respondent's personnel policies. His reprimand, however, was ultimately based on his absence from his work area. As a preliminary matter, I find that the *nature* of his inquiries fell within the category of protected concerted activities.<sup>3</sup>

2. Assuming that Rosaly's personnel inquiries were protected concerted activity, did Rosaly engage in such activities for extended periods on working time and thereby render such activities unprotected?

While I found that Rosaly initially received permission around 9 a.m. to leave his work area and visit the administration building, I further find that he spent a considerable amount of working time, including the time spent at the control room talking to Muniz, discussing Respondent's personnel rules dealing with absenteeism and raises. Rosada's undisputed testimony, which I credit, is to the effect that when he met with Rosaly and gave him his written reprimand he advised Rosaly that, if he wanted to make such inquiries, he should do so on his own time.

Rosada further testified credibly that he considered Rosaly's absence from his work area a "gross violation" because he had been away from his work area for extended periods of time. When questioned about this, Rosada testified:

I was told that he [Rosaly] was at those different places, and I said, "Well, if he was in 20 minutes in each of them it would be an hour and a half."

Further on he stated that Martinez told him Rosaly had been seen in those places and that at his first interview with Rosaly about the matter on April 17, Rosaly admitted it and promised not to do it again.

Although Rosada initially gave Rosaly a verbal warning, he was advised by Martinez to check what discipline had been administered in other cases. After Rosada checked with the maintenance department about their recent disciplinary cases, he decided that 6 months probation was appropriate because he deemed it a gross violation. Moreover, Rosaly had the opportunity to file a grievance on his April 1979 reprimand and did not do so. Thus, it confirms the view that Respondent's reprimand centered on his inquiries being made on "working time." While it is true as I previously discussed that Rosaly was not given other work by Valentine, his relief supervisor, or by Rosada, the shift foreman, he was, nevertheless, required to stay in his work area and assist the repair crew, when and if they arrived to repair the conveyor line. This is not to say that the Company could not have better utilized Rosaly during this shutdown period but that is not the critical issue here. If Rosaly had limited his inquiries to nonworking time, the protected nature of his inquiries would have protected him from discipline. But just as a union advocate can be discharged for engaging in organizational activities on working time, so too can Rosaly be disciplined for engaging in personnel inquiries which affected Abrams and fellow employees, on working time. Accordingly, while the nature of Rosaly's activities would fall within the category of protected

<sup>2</sup> George Valentine was a fellow employee of Rosaly's and only occasionally a relief supervisor. After Rosaly's discharge, Valentine, at the behest of Rosaly, executed an affidavit supportive of Rosaly and appeared to be struggling to tell the facts as truthfully as possible unless it involved Rosaly's absence from his work area.

<sup>3</sup> *Washington Aluminum Co.*, 370 U.S. 9 (1962); *Alleluia Cushion Co. Inc.*, 221 NLRB 999 (1975).

concerted activities, his engaging in such matters for extended periods of working time renders it unprotected and subject to discipline.<sup>4</sup>

3. Was Rosaly's discharge on May 23, 1979, prompted by his allegedly sleeping on the job or was his discharge motivated by his earlier protected activity?

Despite my earlier finding that Rosaly's engaging in personnel inquiries for extensive periods of working time made such activity unprotected, I think it prudent to examine Rosaly's subsequent discharge for evidence of Company animus prompted by the nature of his inquiries and to make certain factual determinations about the incident.

Lopez credibly testified that on the morning of May 22, 1979, a member of a repair crew called him and informed him that the malfunction in the conveyor belt had been repaired and asked that someone test the line. He informed him that Rosaly was the person to test the line. The repair crew advised him that Rosaly was not to be found. Lopez then had Rosaly paged several times and, getting no response, went himself to test the line. After he tested the conveyor line, he began to personally search for Rosaly. He testified that he located Rosaly in a restroom, sitting asleep on a commode. He stated that he recognized Rosaly through a crack in the door and that although he knocked on the door he got no response. Thereafter, he returned to his work area and again had Rosaly paged. When Rosaly finally called in, he advised Rosaly to go to lunch but to report back to him after lunch was over. When Rosaly returned from lunch, Lopez asked him where he had been and informed him that he had discovered him sleeping in the restroom. Rosaly denied this, claiming that he had injured his leg jumping over a conveyor belt and had been in a different restroom, nursing his bruised leg. As a result of this incident, Lopez issued a second written reprimand which resulted in Rosaly's discharge.

According to Rosaly, he had not been sleeping but had been in a restroom nursing his bruised leg and that a fellow employee informed him that he was being paged. He stated that he was in the bathroom in the control room and not the bathroom Lopez said he had found Rosaly asleep. Tony Roman, another finishing technician, testified that on the morning in question he had entered the control room bathroom and seeing Rosaly there, told him that "Douglas [Lopez] was looking for you." When Rosaly reported to Lopez, he was sent to lunch but asked to report back after lunch. When he returned, Lopez questioned Rosaly as to his whereabouts before lunch and Lopez told him he had found him sleeping. On the morning of his next workday, May 21, on or about 7:10 a.m., Rosaly was called into Lopez' office and given a written reprimand for sleeping on the job. Rosaly denied doing so but signed the reprimand and asked Lopez to withhold action until he was able to prepare a grievance.

When Rosaly reported to work on the evening of May 21, he was prevented from entering the plant and advised to report to Rafael Martinez' office at 9 a.m. the

following morning. On the morning of May 22, Rosaly was escorted by William Gall to Gall's office where Samuel Quinones, the plant manager, was present. Rosaly's two written reprimands were discussed and Rosaly denied sleeping on the job. In view of Rosaly's denial, further proceedings on Rosaly's discharge were postponed. The following morning, Douglas Lopez reported along with Rosaly, and Lopez identified Rosaly as the one he had seen in the bathroom sleeping. After the positive identification of Rosaly by Lopez, Rosaly was terminated. In deciding to discharge Rosaly, it was noted that sleeping on the job was a serious offense particularly in light of Rosaly's being on probation. When questioned as to whether Rosaly would have been terminated if he had not been already on probation, Gall responded that he "probably" would have as others had been terminated for sleeping on the job.

I do not credit Rosaly that he was in a different bathroom or that he was not asleep but merely meditating and nursing a bruised leg. Rosaly was admittedly absent from his assigned work area for a period of at least 25 minutes and perhaps as long as 45 minutes. Conversely, in crediting Lopez' version and that he was able to correctly identify Rosaly, I note that at the time of the hearing at which he testified, Lopez was no longer employed by Dupont and there was no necessity to justify his actions to Dupont. I find it unnecessary to determine whether Rosaly would have been discharged if he had not been on probation inasmuch as I have found that Rosaly being reprimanded and placed on probation was not motivated by the nature of his inquiries but primarily by his extended absences from his working area.

#### Summary and Conclusions

I have concluded that Rosaly's personnel inquiries while by their nature inherently protected activities, lost that protected status because he engaged in such activities over extended periods of working time. I also reject any view that Respondent was engaged in an elaborate scheme or conspiracy to discharge Rosaly by placing him on probation and then discharging him because he had irked management by his inquiries about Respondent's personnel policies. Rosada gave out the first written reprimand and based his written reprimand and probation on the serious nature of his offense, namely, his extended absences from his work area, and the fact that probation was given on a similar incident in maintenance that occurred shortly before. Secondly, the second written reprimand was given by Lopez, his immediate supervisor, because he was found in a bathroom asleep instead of his work area. Lastly, management delayed Rosaly's discharge to further investigate Rosaly's denial that he had been asleep. It is unlikely that a management looking for a pretext to terminate an employee would have gone to the lengths of verifying the facts in the sleeping incident. While Rosaly's reprimands and probation may not have been completely equitable,<sup>5</sup> I find no evidence that

<sup>4</sup> *Peyton Packing Company*, 49 NLRB 828, 843-844 (1943), cited in *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 803, fn. 10 (1945).

<sup>5</sup> There is evidence adduced by counsel for the General Counsel that other individuals received warnings or "contacts" for various violations including absences from assigned work area without being placed on pro-

*Continued*

it was administered as part of a plan to rid itself of Rosaly because the nature of his personnel inquiries or any other protected concerted activities. Accordingly, I recommend that the complaint be dismissed.

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bation. See G.C. Exhs. 9, 10, 15, 17, and 18. However, G.C. Exhs. 14 and 16 disclose terminations for sleeping. Lastly, I found that it was Rosada's decision to put Rosaly on probation because of Rosaly's extended absences from his work area and not because of the nature of his protected concerted activity.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent's discharge of Pablo Rosaly Vega was not violative of Section 8(a)(1) of the Act.

[Recommended Order for dismissal omitted from publication.]